No. 90-1014

IN THE

Supreme Court of the United States

October Term, 1990

ROBERT E. LEE, ET. AL.,

Petitioners,

v.

DANIEL WEISMAN, ETC.

Respondent.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF LIBERTY COUNSEL, AMICUS CURIAE, IN SUPPORT OF THE PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

This case presents important issues pertaining to invocations and benedictions at public school promotion and graduation services. Even more importantly, the continuing validity of the three part *Lemon* test is questioned.

Liberty Counsel, based in Orlando, Florida, is a non-profit corporation organized to defend, restore, and preserve religious liberties. Since the *Lemon* test has spawned opinions for and against the constitutionality of graduation prayers, Liberty Counsel is faced with the dilemma of what advice to give on this issue. School boards, concerned parents and students often request legal opinions

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[1]Counsels of Record for Petitioners and Respondents have consented to the filing of this brief and their letters of consent have been filed with Clerk pursuant to Rule 37.

regarding graduation ceremonies. School boards have been sued for permitting and/or prohibiting such prayers. Students selected to present prayers at school ceremonies have been censored, and sometimes reprimanded, thereby suffering humiliation and emotional distress. Because of direct involvement in these issues, Liberty Counsel believes the expertise of its counsel in First Amendment litigation would be of assistance to this Court.

SUMMARY OF ARGUMENT

The *Lemon* test is inconsistent with the Establishment Clause and has precipitated chaos among lower courts; its subjective application should be abandoned. The subjectivity of the *Lemon* test results in chaotic lower court decisions and therefore should be abandoned. The *Lemon* test is not a comprehensive test by which the

Establishment Clause can be analyzed and is questionable as a helpful signpost or guideline and should be abandoned.

The original intent of the First Amendment was to allow freedom to worship as one pleased without government interference or oppression, thereby prohibiting government coercion or compulsion of belief or non-belief. The *Lemon* test undermines the original intent of the First Amendment and encourages favoritism toward those who do not believe to the detriment of those who do believe. History establishes the primary concern for adopting the Establishment Clause was that government would not be able to coerce religious adherence, enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience or accept any religious creed. Thus, the proper framework for Establishment Clause

analysis is a coercion standard. Utilization of a coercion standard would permit invocations and benedictions at public school graduation ceremonies.

I. THE *LEMON* TEST HAS PRECIPITATED CHAOS AMONG LOWER COURTS[2] AND ITS SUBJECTIVE APPLICATION SHOULD THEREFORE BE ABANDONED.

A. The Subjectivity Of The *Lemon* Test Results In Chaotic Lower Court Decisions And Therefore Should Be Abandoned.

The subjective nature of the *Lemon* test has resulted in chaotic, conflicting decisions in the lower courts. Among the areas effected are religion in the public schools, prayers, oaths and proclamations, public displays, state control over religious organizations, and miscellaneous areas such as religious holidays.

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[2]The decisions presented in this section may not represent the final holdings but are cited as illustrations of the chaos caused among the lower courts by the *Lemon* test.

The *Lemon* test offers a rigid framework that lacks clear guidance. Highly subjective interpretations tend to inhibit government's accommodation of beliefs inherent in our nation's religious heritage. The secular purpose prong has never been fully defined. Courts are free to overlook articulated secular purposes in favor of the view that *anything* with a religious connotation can only have a religious purpose.[3]

Evidence that the primary effect of an act is neutral is largely ignored as courts focus instead on the secondary religious aspects when applying the

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[3]*See e.g., Gilfillan v. City of Philadelphia*, 637 F.2d 924 (1980)(Expenditures for visit by Pope (head of state) violated the purpose prong because of his religious affiliation); *Greater Houston Chapter ACLU v. Eckels*, 589 F. Supp. 222 (S.D. Tex. 1984) (Erecting Crosses and Star of David was violative despite assertions of secular purpose).

effects prong.[4] The paradoxical nature of the entanglement prong leads to subjective interpretations of what constitutes entanglement and of what is excessive.[5]

1. Religion in Public Schools

The state may not display a student painting with a religious theme in a school auditorium;[6] but it may teach Biblical stories so that students can

[4]*See e.g., Americans United For Separation of Church & State v. Dunn*, 384 F. Supp. 714 (M.D. Tenn. 1974) (Tuition grants to colleges without restriction as to use violates second prong); *Friedman v. Board of County Commissioners*, 781 F.2d 777 (10th Cir. 1985) (Religious symbols on county seal violates second prong).

[5]*Compare Intercommunity Center for Justice & Peace v. Immigration & Naturalization Service*, 910 F.2d 42 (2d Cir. 1990)(regarding religious organization to comply with employer verification and sanctions of Immigration Reform and Control Act is not excessive entanglement), *with N.L.R.B v. Bishop Ford Central Catholic High School*, 623 F.2d 818 (2d Cir. 1980) (N.L.R.B. order requiring religious school to recognize Union for lay faculty constitutes entanglement).

[6]*Joki v. Board of Education*, 745 F. Supp. 823 (N.D.N.Y. 1990).

appreciate art with Biblical themes.[7] The Bible may not be read without comment,[8] and it may[9] or may not[10] be taught in a course of instruction. Public school students may or may not distribute religious literature;[11] but Gideons may not.[12] Subjects of a religious nature may appear

[7] *Crockett v. Sorenson*, 1422 (W.D.Va. 1979); *Wiley v. Franklin*, 474 F. Supp. 525 (E.D. Tenn. 1979); *Wiley V. Franklin*, 468 F. Supp. 133 (E.D. Tenn. 1979).

[8]*Meltzer v. Board of Public Instruction*, 577 F.2d 311 (5th Cir. 1978); *Goodwin v. Cross County School District*, 394 F. Supp. 417 (E.D. Ark. 1973); *ACLU v. Wallace*, 331 F. Supp. 966 (M.D.Ala. 1971), *aff'd*, 456 F.2d 1069 (5th Cir. 1972); *Lynch v. Indiana State University Board of Trustees*, 378 N.E.2d 900 (Ind. App. 1978).

[9]*See supra* note 6; *Edwards v. Aguillard*, 482 U.S. 578 (1987).

[10]*Doe v. Human*, 725 F. Supp. 1499 (W.D. Ark. 1989); *Thompson v. Waynesboro Area School District*, 673 F. Supp. 1379 (M.D. Pa. 1987).

[11]*Rivera v. East Otero School District R-1*, 721 F. Supp. 1189 (D. Colo. 1989) (May distribute religious literature); *Hernandez v. Hanson*, 430 F. Supp 1154 (D. Neb. 1977) (May not distribute religious literature).

[12]*Meltzer v.*, 577 F.2d 311.

in a student newspaper, but only occasionally.[13]

School board policy transgresses the principle of government neutrality if it allows a Bible study,[14] prayer club,[15] fellowship group[16] or religious class[17] to meet on school premises. Courts split on whether a moment of silence may start the

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[13]*Arrington v. Taylor*, 380 F. Supp. 1348 (M.D.N.C. 1974).

[14]*Trietley v. Board of Education*, 409 N.Y.S.2d 912 (1978).

[15]*Bender v. Williamsport Area School District*, 741 F.2d 538 (2d Cir. 1984); *Nartowicz v. Clayton County School District*, 736 F.2d 646 (11th Cir. 1984); *May v. Evansville-Vanderburgh School Corp.*, 615 F. Supp. 761 (S.D. Iowa. 1985); *Brandon v. Board of Education*, 487 F. Supp. 1219 (N.D.N.Y. 1980).

[16] *Garnett v. Renton School District* No. 403, 865 F.2d 1121 (9th Cir. 1989); Nartowicz, 736 F.2d 646; *Bell v. Little Axe Independent School District*, 766 F.2d 1391 (10th Cir. 1985); *Clark v. Dallas Independent School District*, 671 F. Supp. 1119 (N.D. Tex. 1987); *but see Board of Education v. Mergens*, 867 F.2d 1076 (8th Cir. 1989), *aff'd*, 110 S.Ct. 2356 (1990).

[17]*Ford v. Manuel*, 629 F. Supp. 771 (N.D. Ohio 1985); *but see Wallace v. Jaffree*, 472 U.S. 38 (1985).

school day.[18]

In school curriculum, health, family living, sex education, and reading programs with religious humanistic content objectionable to parents have been upheld,[19] even where attendance was compulsory.[20] Yet, statutes permitting

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[18]*Walter v. West Virginia Board of Education*, 610 F. Supp. 1169 (D. W.Va. 1985); *May v. Cooperman*, 572 F. Supp. 1561 (D.N.J. 1983) (Moment of silence unconstitutional); *Duffy v. Las Cruces Public Schools*, 557 F. Supp. 1013 (D.N.M. 1983) (Moment of silence is unconstitutional); *Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976) (Moment of silence is constitutional); *cf. Kent v. Commissioner*, 402 N.E.2d 1340 (Mass. 1980) (Voluntary moment of prayer by student volunteer unconstitutional).

[19]*Grove v. Mead School District. No. 354*, 753 F.2d 1528 (9th Cir. 1985); *Citizens for Parental Rights v. San Mateo County Board of Education*, 124 Cal. Rptr. 68 (1975); *see also Mozert v. Hawkins County Public Schools*, 647 F. Supp. 1194 (E.D. Tenn. 1986); *Smith v. Ricci*, 89 N.J. 514, 446 A.2d 501 (1982).

[20]*Davis v. Page*, 385 F. Supp. 395 (D.N.H. 1974); *Hopkins v. Hamden Board of Education*, 29 Conn. Supp. 397, 289 A.2d 914 (1971); *Smith v. Ricci*, 446 A.2d at 501. *But see, Smith v. Board of School Commissioners*, 655 F. Supp. 939 (S.D. Ala. 1987); *cf. Malnak v. Yogi*, 592 F.2d 197

teaching concerning the non-evolutionary origins of life have been stricken.[21]

In the area of release time, students were allowed to go off school premises for religious instruction;[22] but the instruction could not take place near the school building,[23] students could not hand-carry attendance slips,[24] and elective credit could not be given for the course.[25]

(3d Cir. 1979) (Elective "Science of Creative Intelligence-TM" in school violates Establishment Clause); *Smith v. Smith*, 523 F.2d 121 (4th Cir. 1975); *State v. Thompson*, 66 Wis. 2d 659, 225 N.W. 2d 678 (1975).

[21]*Daniel v. Waters*, 515 F.2d 485 (6th Cir. 1975); *Aguillard v. Treen*, 634 F. Supp. 426 (E.D. La. 1985); *McLean v. Arkansas Board of Education*, 529 F. Supp 1255 (E.D. Ark. 1982); *Steele v. Waters*, 527 S.W.2d 72 (Tenn. 1975).

[22]*Lanner v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981); *Smith*, 523 F.2d 121; *Thompson*, 225 N.W.2d 678.

[23]*Doe v. Shenandoah County School Board*, 737 F. Supp. 913 (W.D. Va. 1990).

[24]*Lanner*, 662 F.2d 1349; *Thompson*, 225 N.W.2d 678.

[25]*Lanner*, 662 F.2d 1349; *See Minnesota Federation of Teachers v. Nelson*, 740 F. Supp. 694 (D. Minn. 1990).

Yet, public school intercoms were permitted in seminary classrooms and public schools could maintain mailboxes for seminary instructors.[26] Schools have been forced to defend the recognition of religious observances[27] and prohibition of school dances.[28]

2. Education In General

A parochial school child can participate in a public school band course;[29] but cannot participate in an all-

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[26]*Id.*

[27]*See Florey v. Sioux Falls School District 49-5*, 619 F.2d 1311 (8th Cir. 1980). *See also Student Members of Playcrafters v. Board of Education*, 424 A.2d 1192 (N.J. 1981) (School board forced to defend policy of prohibiting extracurricular activities on Friday, Saturday, and Sunday).

[28]*See Clayton v. Place*, 884 F.2d 376 (8th Cir. 1989).

[29]*Snyder v. Charlotte Public School District*,, 421 Mich. 517, 365 N.W.2d 151 (1985).

county band.[30] If a parochial school child needs remedial services, the district may be allowed to fund services at the student's school;[31] but such provision may be void on its face,[32] or funds may be allowed only if services are performed at "neutral sites".[33]

Public funds may be used to lease classroom space from a church related school, but only if public school children are shielded from religious influence.[34]

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[30]*Thomas v. Allegheny County Board of Education*, 51 Md. App. 312, 443 A.2d 622 (1982).

[31]*See Walker v. San Francisco Unified School District*, 741 F. Supp. 1386 (N.D. Cal. 1990); *Thomas v. Schmidt*, 397 F. Supp. 203 (D. R.I. 1975).

[32]*Wamble v. Bell*, 598 F.Supp 1356 (W.D. Mo. 1984); *Viss v. Pittenger*, 345 F.Supp. 1349 (E.D. Pa. 1972).

[33]*Felton v. Secretary*, 739 F.2d 48 (2d Cir. 1984); *Pulido v. Cavasos*, 728 F. Supp. 574 (W.D. Mo. 1989); *Filler v. Port Washington University Free School District*, 436 F. Supp. 1231 (E.D.N.Y. 1977); *Wolman v. Essex*, 417 F. Supp. 1113 (S.D. Ohio 1976).

[34]*Schmidt*, 397 F. Supp. 203.

Public schools may[35] or may not[36] lease classroom space in parochial schools. Private school students or religious organizations may[37] or may not[38] be

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[35]*Spacco v. Bridgewater School Department*, 722 F. Supp. 834 (D. Mass. 1989); *Americans United for Separation of Church & State v. Paire*, 359 F. Supp. 505 (D.N.H. 1973); *Americans United for Separation of Church & State v. Paire*, 348 F. Supp. 506 (D.N.H. 1972); *Citizens to Advance Public Education v. Porter*, 237 N.W.2d 232 (Mich. 1976) (Shared time secular education program).

[36]*See supra* note 31; *See also Americans United for Separation of Church & State v. School District of Grand Rapids*, 546 F. Supp. 1071 (W.D. Mich 1982); *Americans United for Separation of Church & State v. Porter*, 485 F. Supp. 432 (W.D. Mich. 1980); *Americans United for Separation of Church & State v. Board of Education*, 369 F. Supp. 1059 (E.D. Ky. 1974).

[37]*Gregoire v. Centennial School District*, 907 F.2d 1366 (3d Cir. 1990); *Parents Association of P.S. 16 v. Quinones*, 803 F.2d 1235 (2d Cir. 1986); *Country Hills Christian Church v. Unified School District*, 560 F. Supp. 1207 (D. Kan. 1983); *Resnick v. East Brunswick Township Board of Education*, 389 A.2d 944 (N.J. 1978); *cf. Chess v. Widmar*, 635 F.2d 1310 (8th Cir. 1980) (University must allow recognized student organizations to use school facilities for religious purposes).

permitted to utilize public school facilities. When sectarian students were to receive remedial services at a public school, parents objected believing the segregation was an unconstitutional advancement of religion and would cause feelings of inferiority.[39]

Tuition tax breaks have generally been found to form an "unconstitutional bridge between church and state."[40]

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[38]*Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982); *Lamb's Chapel vs. Center Moriches School District*, 736 F. Supp. 1247 (E.D.N.Y. 1990); *Resnick v. East Brunswick Township Board of Education*, 135 N.J. Super. 257, 343 A.2d 127 (1975); *cf. Wallace v. Washoe County School Board*, 701 F. Supp. 187 (D. Nev. 1988); *Ford v. Manuel*, 629 F. Supp. 771 (N.D. Ohio 1985).

[39]*Parents Association of P.S. 16*, 803 F.2d 1235.

[40]*Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1980); *see also Public Funds for Public Schools v. Byrne*, 590 F.2d 514 (3d Cir. 1979); *Kosydar v. Wolman*, 353 F. Supp. 744 (S.D. Ohio 1972); *But see Minnesota Civil Liberties Union v. Roemer*, 452 F. Supp 1316 (D. Minn. 1978).

Financial assistance programs for needy students attending private schools have failed the effects prong.[41] Some courts have disqualified private school college students from receiving government tuition grants,[42] while other courts have allowed such grants.[43] Some plans were upheld only

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[41]*Wolman v. Essex*, 342 F. Supp. 399 (S.D. Ohio 1972); *People v. Howlett*, 305 N.E.2d 129 (Ill. 1973); *Weiss v. Bruno*, 82 Wash.2d 199, 509 P.2d 973 (1973); *contra Barrera v. Wheeler*, 475 F.2d 1338 (8th Cir. 1973).

[42]*See d'Errico v. Lesmeister*, 570 F. Supp. 158 (D.N.D. 1983); *Smith v. Board of Governors*, 429 F. Supp. 871 (D.N.C. 1977); *Americans United for Separation of Church & State v. Dunn*, 384 F. Supp. 714 (M.D. Tenn. 1974); *Americans United for Separation of Church & State v. Bubb*, 379 F. Supp. 872 (D. Kan. 1974); *Opinion of the Justices*, 280 So.2d 547 (Ala. 1973); *State v. Swanson*, 102 Neb. 125, 219 N.W.2d 727 (1974). *But cf. Durham v. McLeod*, 192 S.E.2d 202 (S.C. 1972) (Loans constitutional).

[43]*See Americans United for Separation of Church & State v. Blanton*, 433 F. Supp. 97 (M.D. Tenn. 1977); *Lendall v. Cook*, 432 F. Supp. 971 (D. Ark. 1977); *American United for Separation of Church & State v. Rogers*, 538 S.W.2d 711 (Mo. 1976); *See Cecrle v. Illinois Educational Facilities Authority*, 288 N.E.2d 402 (Ill. 1972).

where the use of the funds was restricted.[44] Students may receive grants to study philosophy or religion in public schools but not theology in pervasively sectarian schools failing a 36 prong test.[45] Veteran's Administration and some handicap tuition assistance programs have generally been held valid for recipients attending sectarian schools.[46]

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[44]*See Walker v. San Francisco Unified School District*, 741 F. Supp. 1386 (N.D. Cal. 1990); *Lendall*, 432 F. Supp 971; *Smith*, 429 F. Supp 871; *Americans United for Separation of Church & State Fund, Inc. v. State*, 648 P.2d 1072 (Colo. 1982).

[45]*See Minnesota Federation of Teachers v. Nelson*, 740 F. Supp 694 (D. Minn. 1990); *But cf. In Re Dickerson*, 474 A.2d 30 (N.J. 1983) (Testamentary scholarships for ministry students at public institute constitutional).

[46]*Witters v. Washington Department of Service of the Blind*, 474 U.S. 481 (1986); *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D. S.C. 1974).

States may provide bus transportation to private school children,[47] but in Rhode Island, the enabling statute was stricken three times.[48] Public funds cannot be used to provide textbooks to private school students in some states,[49] but in others,

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[47]*Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1980) (Provision valid but not severable); *Cromwell Property Owners Association v. Toffolon*, 495 F. Supp. 915 (D. Conn. 1979); *Board of Education v. Bakalis*, 54 Ill.2d 448, 299 N.E.2d 737 (1973); *State v. School District*, 320 N.W.2d 472 (Neb. 1982); *Springfield School District v. Department of Education*, 397 A.2d 1154 (Pa. 1979); *cf. Americans United for Separation of Church & State v. Benton*, 413 F. Supp 955 (S.D. Iowa 1975) (No cross-district transport).

[48]*Members of Jamestown School Committee v. Schmidt*, 699 F.2d 1 (1st Cir. 1983); *Members of Jamestown School Committee v. Schmidt*, 525 F. Supp. 1045 (D.R.I. 1981); *Members of Jamestown School Committee v. Schmidt*, 427 F. Supp. 1338 (D.R.I. 1977).

[49]*California Teachers Association v. Riles*, 632 P.2d 953 (Cal. 1981); *Mallory v. Barrera*, 544 S.W.2d 556 (Mo. 1976); *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974); *contra Elbe v. Yankton Independent School District No. 1*, 714 F.2d 848 (8th Cir. 1983); *Wolman v. Essex*, 417 F. Supp. 1113 (S.D. Ohio 1976); *Cunningham v. Lutjeharms*, 231 Neb. 756, 437 N.W.2d 806

it is acceptable for the state to reimburse parochial schools for textbook expenditures.[50] Decisions also limit the provision of educational materials to sectarian schools.[51] Tax deductions to parents for textbooks and transportation for children attending any school have been stricken because of the potential for excessive entanglement.[52] In some cases states may not reimburse a sectarian school for costs incurred performing state mandated tasks, such as testing and

(Neb. 1989).

[50]*Americans United for Separation of Church & State v. Paire*, 359 F. Supp. 505 (D.N.H. 1973); *Pennsylvania Department of Education v. The First School*, 348 A.2d 458 (Pa. 1975).

[51]*Americans United for Separation of Church & State v. Oakey*, 339 F. Supp. 545 (D. Vt. 1972); *But see Wolman*, 417 F. Supp. 1113.

[52]*Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1980).

record-keeping,[53] but in other cases it is permissible.[54]

3. State Control Over Religious Organizations

State regulation of private schools regarding compulsory attendance,[55] teacher certification,[56] and curriculum[57] have been

[53]*Committee for Public Education & Religious Liberty v. Levitt*, 342 F. Supp. 439 (S.D.N.Y. 1972).

[54]*Committee for Public Education & Religious Liberty v. Levitt*, 461 F. Supp. 1123 (S.D.N.Y. 1978); *Thomas*, 397 F. Supp. 203.

[55]*Fellowship Baptist Church v. Benton*, 815 F.2d 485 (8th Cir. 1987); *Attorney General v. Bailey*, 436 N.E.2d 139 (Mass. 1982); *State v. Shaver*, 294 N.W.2d 883 (N.D. 1980).

[56]*Fellowship Baptist Church*, 815 F.2d 486; *But cf. Bangor Baptist Church v. State*, 549 F. Supp. 1208 (D. Me. 1982); *Johnson v. Charles City Community Schools Board of Education*, 368 N.W.2d 74 (1985); *Sheridan Road Baptist Church v. Department of Education*, 348 N.W.2d 263 (Mich. 1984); *State v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571 (1981). *cf. State v. Anderson*, 427 N.W.2d 316 (N.D. 1988) (Home schooling parents violated teacher certification requirements).

upheld. State employees may not teach or provide remedial services in private schools,[58] but may visit classrooms to observe both secular and religious teaching, suggest teacher replacements, and review accreditation.[59] However, student teachers may not receive credit for teaching at parochial schools.[60]

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[57]*New Life Baptist Church Academy v. East Longmeadow*, 885 F.2d 952 (1st Cir. 1989); *Sheridan Road Baptist Church v. Department of Education*, 348 N.W. 2d 263 (Mich. 1984); *State v. Faith Baptist Church*, 301 N.W.2d 571 (1981); *cf. New Jersey State Board of Higher Education v. Board of Directors*, 448 A.2d 988 (N.J. 1982) (Prohibiting conferring of degree by unlicensed institution applied to a sectarian college whose religious doctrine precluded state licensure).

[58]*Pulido v. Cavazos*, 728 F. Supp. 574 (W.D. Mo. 1989); *Wamble*, 598 F. Supp 1356; *Americans United for Separation of Church & State v. Porter*, 485 F. Supp. 432 (W.D. Mich. 1980); *Americans United for Separation of Church & State v. Board of Education*, 369 F. Supp 1059 (E.D. Ky. 1974); *but see Walker v. San Francisco United School District*, 741 F. Supp. 1386 (N.D. Cal. 1990).

[59]*New Life Baptist*, 885 F.2d 952.

[60]*Stark v. St. Cloud State University*, 802 F.2d 1046 (8th Cir. 1986).

State inquiry into a religious organization's operating costs violates the Establishment Clause,[61] unless requested by the Internal Revenue Service.[62] The state may enforce compliance with minimum wage laws,[63] the Fair Labor Standards Act,[64] and force participation in

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[61]*Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979); *Fernandez v. Lima*, 465 F. Supp. 493 (N.D. Tex. 1979). *See also Heritage Village Church & Missionary Fellowship v. State*, 263 A.2d 726 (N.C. 1980) (Act requiring only certain religious groups to file information is unconstitutional).

[62]*United States v. Freedom Church*, 613 F.2d 1316 (1st Cir. 1979); *Lutheran Social Service v. United States*, 583 F. Supp. 1298 (D. Minn. 1984); *cf. Hernandez v. Commissioner*, 819 F.2d 1212 (1st Cir. 1987); *St. Bartholomew's Church v. City of New York*, 728 F. Supp. 958 (S.D.N.Y. 1989) (State inquiry into church records does not violate entanglement prong).

[63]*Archbishop of Roman Catholic Apostolic Archdiocese v. Guardiola*, 628 F. Supp. 1173 (D.P.R. 1985); *Donovan v. Shenandoah Baptist Church*, 573 F. Supp. 320 (W.D. Va. 1983).

[64]*Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990); *E.E.O.C. v. Freemont Christian School*, 781 F.2d 1362 (9th Cir. 1986); *Ninth & O St. Baptist Church v. E.E.O.C.*, 616 F. Supp. 1231 (W.D. Ky. 1985); *Russell v. Belmont*

FICA and FUTA,[65] despite an organization's religious beliefs to the contrary. The National Labor Relations Board may not be applicable to parochial schools,[66] but a

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[65]*South Ridge Baptist Church v. Industrial Commission*, 911 F.2d 1203 (6th Cir. 1990) (Church included within workers' compensation system); *Bethel Baptist Church v. United States*, 822 F.2d 1334 (3d Cir. 1987); *Young Life v. Division of Employment & Training*, 650 P.2d 515 (Colo. 1982) (Religious organization subject to unemployment tax); *Baltimore Lutheran High School Association v. Employment Security Administration*, 490 A.2d 701 (Md. 1985) (School subject to unemployment tax); *Contra Grace Lutheran Church v. North Dakota Employment Security Bureau*, 294 N.W. 767 (N.D. 1980) (Church not subject to unemployment tax); *The Christian Jew Foundation v. State*, 353 S.W.2d 607 (Tex. 1983) (Organization exempt from unemployment tax); *Community Lutheran School v. Iowa Department of Job Service*, 326 N.W.2d 286 (Iowa 1982) (School exempt from unemployment tax).

[66]*Universidad v. N.L.R.B.*, 793 F.2d 383 (1st Cir. 1985); *see also N.L.R.B. v. Salvation Army*, 763 F.2d 1 (1st Cir. 1985); *N.L.R.B. v. Bishop Ford Central Catholic High School*, 623 F.2d 818 (2d Cir. 1980); *Catholic Bishop v. N.L.R.B.*, 559 F.2d 1112 (2d Cir. 1977); *McCormick v. Hirsh*, 460 F. Supp. 1337 (M.D. Pa. 1978); *contra N.L.R.B. v. St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981); *Grutka v. Barbour*, 549 F.2d 5 (7th Cir. 1977).

state labor board may have jurisdiction.[67] Sectarian schools are prohibited from utilizing CETA workers.[68] Civil rights statutes have not been enforced against religious organizations,[69] but courts have split as to whether the "reasonable accommodation" requirement may be enforced

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[67]*Goldsborough Christian Schools, Inc. v. United States*, 436 F. Supp 1314 (E.D.N.C. 1977); *cf. Catholic High School Association v. Culvert*, 753 F.2d 1161 (2d Cir. 1985).

[68]*Decker v. O'Donnell*, 663 F.2d 598 (7th Cir. 1980) (CETA created entanglement); *see also, Decker v. Department of Labor*, 473 F. Supp. 770 (E.D. Wis. 1979).

[69]*Dayton Christian Schools v. Ohio Civil Rights Commission.*, 766 F.2d 932 (6th Cir. 1985); *Cochran v. St. Louis Preparatory Seminary*, 717 F. Supp. 1413 (E.D. Mo. 1989); *Maguire v. Marquette University*, 627 F. Supp 1499 (E.D. Wis. 1986); *E.E.O.C. v. Southwestern Baptist Theological Seminary*, 485 F. Supp. 255 (N.D. Tex. 1980); *E.E.O.C. v. Mississippi College*, 451 F. Supp. 564 (S.D. Miss. 1978); *contra Dolter v. Wahlert High School*, 483 F. Supp. 266 (N.D. Iowa 1980); *McLeod v. Providence Christian School*, 408 N.W.2d 146 (Mich. 1987); *but see E.E.O.C. v. Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1982).

against secular employees.[70]

Two entanglement triangles arise in the provision of child care. First, the state may purchase child care services from religiously affiliated organizations[71] and may consider the religious preference of the parents for placement,[72] but the agency cannot impose its religious

[70]*Protos v. Volkswagon of America, Inc.,* 797 F.2d 129 (3d Cir. 1986); *Nottleson v. Smith Steel Workers*, 643 F.2d 445 (7th Cir. 1981); *E.E.O.C. v. Jefferson Smurfit Corp.*,724 F. Supp. 881 (M.D. Fla. 1989); *Gavin v. Peoples Natural Gas Co.*, 464 F. Supp. 622 (W.D. Pa. 1979); *Michigan Department of Civil Rights v. General Motors*, 317 N.W. 16 (Mich. 1982); *American Motors Corp. v. Department of Industry, Labor, & Human Relations*, 286 N.W.2d 847 (Wis. 1978).

[71]*Wilder v. Bernstein,* 848 F.2d 1338 (2d Cir. 1988).

[72]*Id. cf. Dickens v. Ernesto*, 281 N.E.2d 153 (N.Y. 1982) (Religious affiliation requirements in adoption proceeding constitutional); *Bonjour v. Bonjour*, 592 P.2d 1233 (Alaska 1979) (Statute specifying religious needs of child upheld); *Zucco v. Garrett*, 501 N.E.2d 875 (Ill. 1986) (Awarding custody based on religious practices is abuse of discretion).

doctrine upon a child.[73] Second, religious child care facilities exempted from licensure may or may not be deemed to fail the *Lemon* test.[74] Church-run day care centers are subject to zoning restrictions,[75] but a city may not exempt

[73]*Arneth v. Gross,* 699 F. Supp. 450 (S.D.N.Y. 1988).

[74]*Forest Hills Early Learning Center v. Lukhard,* 728 F.2d 230 (4th Cir. 1984); *Forte v. Colder,* 725 F. Supp. 488 (M.D. Fla. 1989); *see The Corpus Christi Baptist Church, Inc. v. Texas Department of Human Resources* 481 F. Supp. 1101 (S.D. Tex. 1979); *Forest Hills Early Learning Center, Inc. v. Grace Baptist Church*, 846 F.2d 260 (4th Cir. 1988); *North Valley Baptist Church v. McMahon*, 696 F. Supp 578 (E.D. Cal. 1988); *Cohen v. City of Des Plaines*, 742 F. Supp. 458 (N.D. Ill. 1990); *State v. Corpus Christi People's Baptist Church, Inc.*, 683 S.W.2d 692 (Tex. 1984); *State Department of Social Services v. Emmanuel Baptist Pre-School*, 455 N.W.2d 1 (Mich. 1990); *Pre-School Owner's Association v. Department of Children & Family Services*, 518 N.E.2d 1018 (Ill. 1988); *Arkansas Day Care Association, v. Clinton*, 577 F. Supp 388 (E.D. Ark. 1983). *cf. State v. McDonald*, 787 P.2d 466 (Okla. 1989) (Religious affiliated "boy's ranch" subject to state licensing requirements).

[75]*First Assembly of God v. City of Alexandria*, 739 F.2d 942 (4th Cir. 1984).

them from requirements imposed upon commercial operators.[76]

4. Prayers, Oaths and Proclamations[77]

Invocations may open public meetings,[78]but not a high school football game[79] or assembly[80] and a judge may not open his daily sessions with a brief prayer.[81]

Resolutions and proclamations urging days of prayer have been challenged and

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[76]*Cohen*, 742 F. Supp. 458; *cf. Arkansas Day Care Association*, 577 F. Supp. 388 (Statute disparately treated religious facilities).

[77]Because this Court has been thoroughly briefed by the parties on this issue, only a brief analysis is presented here.

[78]*Bogen v. Doty*, 598 F.2d 1110 (8th Cir. 1979); *Marsa v. Wernick*, 430 A.2d 888 (N.J. 1981); *Lincoln v. Page*, 241 A.2d 799 (N.H. 1968).

[79]*Jager v. Douglas County School District*, 862 F.2d 824 (11th Cir. 1989).

[80]*Collins v. Chandler Unified School District*, 644 F.2d 759 (9th Cir. 1981).

[81]*North Carolina Civil Liberties Union v. Constangy*, No. C-C-89-438-M (W.D. N.C. Oct. 18, 1990).

upheld,[82] but a "motorist's prayer" may not be printed on the back of a state road map.[83]

5. Public Displays

Despite widely held religious beliefs and the historical significance of Christmas, the *Lemon* test makes upholding religiously oriented Christmas decorations a juggling act. The following may not be displayed on public grounds: Nativity scenes, paintings depicting scenes from the life of Christ, signs reading "Keep Christ in Christmas", and crosses.[84]

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[82]*Zwerling v. Reagan*, 576 F. Supp. 1373 (C.D. Cal. 1983); *Allen v. Consolidated City of Jacksonville*, 519 F. Supp. 1532 (M.D. Fla. 1989).

[83]*Hall v. Bradshaw*, 630 F.2d 1018 (4th Cir. 1980); *Citizens Concerned for Separation of Church & State v. Denver*, 508 F. Supp. 823 (D. Colo. 1981).

[84]*American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1981); *ACLU v. City of Birmingham*, 791 F.2d 1561 (6th Cir. 1986); *ACLU v. County of Delaware*, 726 F. Supp. 184 (S.D. Ohio 1989); *Allen v. Morton*, 495 F.2d 65 (D.C. Cir. 1973); *Burelle v. City of Nashuwa*, 599 F. Supp. 792 (D.N.H. 1984); *Citizens*

However, a menorah may be placed on public property during Hanukkah.[85] Courts are split over whether government may participate in Christmas celebrations

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Concerned for Separation of Church & State v. Denver, 526 F. Supp. 1310 (D. Colo. 1989); *Citizens Concerned for Separation of Church & State v. City & County of Denver*, 481 F. Supp. 522 (D. Colo. 1979); *see also Smith v. County of Albemarle*, 895 F.2d 953 (4th Cir. 1990); *Smith v. Linstrom*, 699 F. Supp. 549 (W.D. Va. 1988); *Conrad v. Denver*, 656 P.2d 662 (Colo. 1982); *cf. ACLU v. Wilkinson*, 895 F.2d 1098 (6th Cir. 1990) (Rustic stable); *contra Mather v. Village of Mundelin*, 864 F.2d 1291 (7th Cir. 1989); *Citizens Concerned for Separation of Church & State v. City & County of Denver*, 508 F. Supp 823 (D. Colo. 1979); *but cf. McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984) (Nativity scenes); *Doe v. Small*, 726 F. Supp. 713 (N.D. Ill. 1989) (Paintings of Christ); *Goldstein v. Fire Department*, 559 F. Supp. 1389 (S.D.N.Y. 1983) (Signs); *see also ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986); *ACLU of Mississippi v. Mississippi State General Services Administration*, 652 F. Supp. 380 (S.D. Miss. 1987) (Crosses); *Libin v. Town of Greenwich*, 625 F. Supp. 393 (D. Conn. 1985).

[85]*Kaplan v. City of Burlington*, 700 F. Supp. 1315 (D. Vt. 1988).

having any element of religion.[86]

Courts are divided over whether the state may[87] or may not[88] erect a cross as a war memorial. Where a state exercised eminent domain over a cemetery, a court prohibited the state from erecting crosses and a statue of Jesus, but allowed the state to provide and erect religious markers chosen by the descendants.[89] Crosses placed on government property have generally been prohibited;[90] but crosses

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[86]*Allen v. Morton*, 495 F.2d 65; *Society of Separationists, Inc. v. Clements*, 677 F. Supp. 509 (W.D. Tex. 1988); *Greater Houston Chapter of ACLU v. Eckels*, 589 F. Supp. 222 (M.D. Tex. 1984).

[87]*Eugene Sand & Gravel, Inc. v. Eugene*, 276 Or. 1007, 558 P.2d 338 (1976).

[88]*Jewish War Veterans v. United States*, 695 F. Supp. 3 (D.D.C. 1988).

[89]*Birdine v. Moreland*, 579 F. Supp. 412 (N.D. Ga. 1983).

[90]*Mendelson v. City of St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989); *Hewitt v. Joyner*, 705 F. Supp. 1443 (C.D. Cal. 1989); *ACLU v. Rabun County Chamber of Commerce, Inc.*, 510 F. Supp. 886 (N.D. Ga. 1981); *Fox v. City of Los Angeles*, 587 P.2d 663 (Cal. 1978).

and religious symbols on official seals may or may not be permissible.[91]

The Ten Commandments have been removed from schools,[92] but permitted to remain on other public property.[93] A legislature may designate a room for prayer and meditation, but religious decorations or use of the room may be prohibited.[94]

6. Miscellaneous

An order of then Governor Reagan giving state employees a three hour paid

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[91]*Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987); *Friedman v. Board of City Commissioners*, 781 F.2d 777 (10th Cir. 1985); *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989); *Harris v. City of Zion*, 729 F. Supp. 1242 (N.D. Ill. 1990); *Johnson v. Board of County Commissioners*, 528 F. Supp. 919 (D.N.M. 1981); *Murray v. City of Austin*, 744 F. Supp. 771 (W.D. Tex. 1990).

[92]*Ring v. Grand Forks Public School District*, 483 F. Supp. 272 (D.N.D. 1980).

[93]*Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1972).

[94]*Van Zandt v. Thompson*, 839 F.2d 1215 (7th Cir. 1988).

holiday on Good Friday violated the Establishment Clause,[95] but a school district was permitted to designate Good Friday a paid holiday in conjunction with a Union Contract.[96]

Religion has been put on the defensive by forcing it to assume a cloak of secularism. Adherence to the *Lemon* test has forced courts to make decisions based on minute quantifiable details reminiscent of the "legalistic minuet" warned against in *Lemon* itself. *Lemon*, 403 U.S. at 614.

B. The *Lemon* Test Is Not A Comprehensive Test By Which The Establishment Clause Can Be Effectively Analyzed And Is Questionable As A Helpful Signpost Or Guideline And Should Be Abandoned.

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[95]*Mandel v. Hodges*, 54 Cal.App.3d 596 (1976).

[96]*California School Employees Association v. Sequoia Union High School District*, 67 Cal.App.3d 157 (1977); *cf. Cammack v. Waihee*, 673 F. Supp. 1524 (D. Haw. 1987) (State may declare Good Friday a legal holiday).

Chief Justice Rehnquist has stated that "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower Federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v Davis*, 454 U.S. 370, 375 (1982). This Court must articulate a clearly defined standard which the lower courts can follow with confidence.

Despite this Court's subsequent description of the test as only a "guideline", *Committee For Public Education v. Nyquist*, 413 U.S. 756 (1973), and "no more than a useful signpost", *Mueller v. Allen*, 436 U.S. 388, 394 (1983), citing *Hunt v. McNair*, 413 U.S. 734, 741 (1973), the test has been used by the lower courts in deciding virtually all

Establishment Clause cases. Instead of being a guideline for the Establishment Clause, the *Lemon* test has become the Establishment Clause. *See Murray v. City of Austin*, 744 F. Supp. 771 (W.D. Tex. 1990).[97] The lower courts are compelled to apply the test in Establishment Clause cases, even where they feel injustice may be done.[98] This is true although this Court has indicated its intention not to be bound to one test and has recognized other standards. See, *Marsh v. Chambers*, 463 U.S. 783 (1983); *Larson v. Valente*, 456 U.S. 228 (1982).

II. THE ORIGINAL INTENT OF THE FIRST AMENDMENT WAS TO ALLOW FREEDOM TO WORSHIP AS ONE PLEASED WITHOUT GOVERNMENT

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[97]("Under *Lemon*, ... [t]he First Amendment is violated if any of the three prongs of the test are violated.") (*citing County of Allegheny v. ACLU*, 109 S.Ct. 3086 (1989)).

[98]*See ACLU v. County of Delaware*, 726 F. Supp 184 (S.D. Ohio 1989) (Nativity scene violates Establishment Clause, "nevertheless this Court reaches its decision in this case with considerable regret").

INTERFERENCE OR OPPRESSION, THEREBY PROHIBITING GOVERNMENT COERCION OR COMPULSION OF BELIEF OR NON-BELIEF.

A. The Lemon Test Undermines The Original Intent Of The First Amendment And Encourages Favoritism Toward Those Who Do Not Believe To The Detriment Of Those Who Do Believe.

Oliver Wendell Holmes' statement is apropos: "A page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). The best interpretation of the First Amendment is one that is "*illuminated by history*". *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984); *Walz v. Tax Commission*, 397 U.S. 664, 671 (1970). This Court has noted the following in this respect:

> In applying the First Amendment to the states through the 14th Amendment, *Cantwell v. Connecut*, 310 U.S. 296 (1940), it would be incongruous to interpret that clause as imposing more stringent First Amendment limits on the states than the draftsmen imposed upon the Federal Government.

Marsh, 463 U.S. at 790-91. Therefore, the historical context of the First Amendment is crucial to a proper resolution of this case.

As the first act of the Continental Congress in 1774, the Rev. Mister Duche opened with prayer and read from Psalm 31.[99] From its inception Congress and state legislatures have begun their

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[99]Mr. Duche's prayer was as follows: Be Thou present O God of Wisdom and direct the council of this honorable assembly; enable them to settle all things on the best and surest foundations; that the scene of blood may be speedily closed; that order, harmony, and peace may be effectually restored, and truth and justice, religion and piety, prevail and flourish among the people. Preserve the health of their bodies, and the vigor of their minds, shower down on them, and the millions they represent, such temporal blessings as Thou seest expedient for them in this world, and crown them with everlasting glory in the world to come. All this we ask in the name and through the merits of Jesus Christ Thy Son and our Saviour. AMEN.

sessions with an invocation by a paid Chaplain. *Marsh,* 463 U.S. at 787-89. *See Lynch,* 465 U.S. at 673-74. Courts have historically opened their daily proceedings with the invocation "God save the United States and this Honorable Court." *Marsh,* 463 U.S. at 786. Even this Court has Moses and the Ten Commandments inscribed above the bench recognizing the Biblical foundations of our legal heritage.[100]

George Washington began the tradition of taking the Presidential oath of office upon the Bible. When he assumed office in 1789, he stated, "it would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the Universe..." *Engel v. Vitale,* 370 U.S. 421, 466 (Stewart, J., dissenting). An

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[100]*See Lynch,* 465 U.S. at 677.

impressive list of presidents subsequent to Washington have invoked the protection and help of Almighty God. *Engel,* 370 U.S. at 446-449.

James Madison, the father of the Bill of Rights, was a member of the Congressional committee that recommended the Chaplaincy system. H.R. Rp. No. 124, 33rd Cong., 1st Sess. (1789), *Reprinted in* 2 No. 2 *Reports of Committees of the House of Representatives* 4 (1854). Madison voted for the bill authorizing payment of chaplains. 1 *Annals of Cong. 891* (J. Gales ed. 1834). Rev. Wm. Linn was elected Chaplain of the House of Representatives and paid $500 from the federal treasury.

September 25, 1789, the day the final agreement was made on the Bill of Rights, the House requested President Washington proclaim a day of Thanksgiving to acknowledge "the many signal favors of

Almighty God." H.R. Jour., 1st Cong., 1st Sess., 123 (1826 ed.); S. Jour., 1st Cong., 1st Sess., 88 (1820 ed.); Lynch, 465 U.S. at 675 n.2. He proclaimed November 26, 1789, a day of Thanksgiving to offer "our prayers and supplications to the great Lord and ruler of nations, and beseech Him to pardon our national and other transgressions." *Id.* Later President Madison issued four Thanksgiving Day proclamations, July 9, 1812, July 23, 1813, November 16, 1814 and March 4, 1815. R. Cord, *Separation of Church & State* 31 (1982). Successive presidents have continued this tradition.

B. History Establishes The Primary Concern For Adopting The Establishment Clause That Prohibits Government From Intentionally, Either Through Coercion Or Compulsion, Compromising Religious Beliefs Or Choice.

"The line we must draw between the permissible and impermissible is one which

accords with history and faithfully reflects the understanding of the Founding Fathers." *School District of Abington Township of Pennsylvania v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring). The historical setting of the Establishment Clause is often reviewed to ensure this Court's interpretation "comport[s] with what history reveals was the contemporaneous understanding of its guarantees." *Lynch* at 673. See also *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Walz v. Tax Commissions*, 397 U.S. 664 (1970); *Marsh v. Chambers*, 463 U.S. 783 (1983). When the First Amendment was adopted it prohibited the federal government from coercively intruding into religion. "Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our

political and cultural heritage." *County of Allegheny v. American Civil Liberties Union*, 109 S.Ct. 3086, 3135 (Kennedy. J., concurring in part and dissenting in part).

History, therefore, mandates the *Lemon* test be replaced by the coercion standard. *An acceptable standard would proscribe government activity that intentionally, either through coercion or compulsion, results in compromising the student's religious beliefs or choice.*[101] This coercion standard comports with the original intent presupposed in the adoption of the Establishment Clause.

The coercion standard has, at least implicitly, been recognized and applied by this Court in several cases. Concerning the issue of release time, this Court

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[101]For further discussion and analysis of a similar standard see Choper, *Religion in the Schools*, 47 Minn. L. Rev. 329 (1963).

recognized

> [W]e are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the State encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. *It may not thrust any sect on any*

> *person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction.*

Zorach v. Clauson, 343 U.S. 306, 313-14 (emphasis added).

Prior to *Zorach*, this Court acknowledged "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to *standardize its children by forcing them to accept instruction ....*" *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925) (emphasis added). This Court has consistently applied the coercion standard in invalidating government actions furthering religious interests through either government coercion or compulsion.[102]

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[102]*See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982); *Engel*, 370 U.S. 421; *McGowen v. Maryland*, 366 U.S. 420 (1961); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1942).

The application of the coercion standard "like many problems in constitutional law, is one of degree." *McCollum v. Board of Education*, 333 U.S. 203, 213 (1948). It is well established "that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 333 (1987) (citing *Hobbie v. Unemployment Appeals Commission*, 107 S.Ct. 1046, 1051 (1987). One time, temporary, annual, or occasional accommodation by the government of religious activity does not violate the First Amendment.[103] "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow

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[103]*See e.g., Schempp*, 374 U.S. at 298 n. 74.

the widest room for discussion, the narrowest range for its restriction, particularly when this right is expressed in conjunction with peaceable assembly." *Thomas v. Collins*, 323 U.S. 516, 532 (1945).[104]

C. Utilization Of The Coercion Standard Allows Invocations And Benedictions At Public School Graduation Ceremonies.

At least two Federal District courts have implicitly acknowledged the coercion standard for analysis in cases involving the identical question of prayer at graduation ceremonies for public schools.[105]

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[104] Case concerned labor union dispute and freedom of speech, but demonstrates that coercion standard has been applied by this Court in other First Amendment cases.

[105] There are relatively few studies which have been done on the historical development of commencement exercises. However, one such study indicates that the "commencement program ... consists primarily of an invocation, a commencement, address, the awarding of degrees, the awarding of honorary degrees, and the benediction." Kevin Sheard, *Academic Heraldry in America* (1962). *See*

One court upheld the practice reasoning

> a member of the clergy, who is in no way compensated by the [school board], pronounce an invocation or benediction at graduation ceremonies which are totally separate from the school routine, does not violate ... the First Amendment. Any use of public tax monies in connection with the invocation and benediction appears to be de minimis.... [N]o infraction of any First Amendment rights will occur because of the opening and closing of clergymen at the graduation exercises. Because there is no compulsion to attend, there is no coercion which would constitute an abridgment of the Free Exercise Clause.

Wood v. Mt. Lebanon Township School District, 342 F. Supp. 1293, 1295 (W.D. Pa. 1972) (citing *School District of Abington*

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also, Mary Gunn, *A Guide to Academic Protocol* (1969). So too, "one of the earliest 'Order of Exercises' for the University of Virginia is dated June 26, 1850 ... [and] lists the orders of events, ... begin[ning] with prayer." John W. Whitehead, *The Rights of Religious Persons in Public Education*, 210 (1991). Though "[c]ommencement exercises in public high schools were not started until 1842 ...[,] the high schools primarily copied the university format and thus included prayer." *Id.*

Township v. Schempp, 374 U.S. 203 (1963)). Another court upheld prayer at graduation services finding

> [t]here is none of the repetitive or pedagogical function of the exercises which characterized the school prayer cases. There is no element of calculated indoctrination. The overall program of which the invocation will be a part is neither educational nor religious, but ceremonial, and the total length of the invocation has been estimated as only a few minutes. Such an occasion with such an invocation has not occurred previously before this audience and it will not occur again. The event, in short, is so fleeting that no significant transfer of government prestige can be anticipated.

Grossberg v. Deusibio, 380 F. Supp. 285, 289 (E.D. Va. 1974).

The application of the coercion standard is consistent with the original intent of the First Amendment. Government acts which, directly or indirectly, compel or coerce, remain prohibited.[106] However,

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[106]*See supra* note 102.

government acts allowing voluntary release time, *Zorach*, supra; supplying textbooks to students in parochial schools, *Board of Education v. Allen*, 392 U.S. 236 (1968); churches tax exempt status, *Walz v. Tax Commissioner*, supra; grants to church-sponsored universities and colleges, *Roemer v. Maryland Board of Public Works*, 426 U.S. 736 (1976); *Tilton v. Richardson*, 403 U.S. 672 (1971); legislative prayer, *Marsh v. Chambers*, 463 U.S. 783 (1983); and religious symbols to be displayed as holiday decorations, *Lynch v. Donnelly*, supra; are just a few of the precedents which remain permissible under the coercion standard.

CONCLUSION

The Court of Appeal's decision should be reversed. Invocations and benedictions are ceremonial exercises dictated by tradition, not by government coercion. Our

religious heritage fosters the freedom to accomodate religious beliefs and creeds. Continuing to utilize the *Lemon* test results in suppression of religious accomodation.

Subjective interpretation of the test in the lower courts has caused chaos which cannot be reconciled with original intent. Instead of government accomodating religious heritage, our nation is being compelled to ignore its religious heritage. Once government accomodation of religion is chilled, those who do not believe are favored at the expense of those who do believe.

The coercion standard allows government to acknowledge our religious heritage while remaining true to the original intent of the Establishment Clause. The coercion standard provides a mechanism for restraining government from

intentionally coercing or compelling compromise of religious beliefs and choice.

The coercion standard allows invocations at graduation ceremonies. Adopting a coercion standard for Establishment Clause cases provides a clear and objective standard by which to make decisions.

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